

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RON E. WATTS

Claimant

VS.

INTERNATIONAL MULTIFOODS CORP.

Respondent

AND

DISCOVER RE

Insurance Carrier

Docket No. 1,006,438

ORDER

Respondent and its insurance carrier requests review of a preliminary hearing Order entered by Administrative Law Judge Julie A.N. Sample on November 7, 2002.

ISSUES

The claimant alleged he suffered a left shoulder injury from repetitive trauma at work through September 2, 2002. After consideration of the preliminary hearing testimony and review of claimant's deposition taken November 4, 2002, the Administrative Law Judge (ALJ) ordered the respondent and its insurance carrier to provide claimant medical treatment with Dr. Larry Frevert.

Respondent and its insurance carrier raise the issue of whether the claimant sustained accidental injury arising out of and in the course of employment on either February 5, 2002, or from a series of injuries through September 2, 2002. Respondent and its insurance carrier further argue claimant's testimony is inconsistent with the medical records and accordingly, claimant's testimony should be rejected.

Conversely, claimant argues he has met his burden of proof to establish he suffered a series of work-related injuries to his left shoulder and the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant initially complained of left shoulder pain on February 5, 2002. Claimant worked on a line and his primary job duty was lifting 50-pound bags that were emptied into a mixer. Claimant told Ray Larkins, the lead person on the line where he was working, that he had hurt his shoulder. Mr. Larkins and claimant also advised Brenda Morris, the third-shift supervisor, that his shoulder was hurting. Claimant advised them he would see his personal physician because he did not think it was anything serious.

Claimant sought treatment for his shoulder from his family physician, Dr. Patrick Miller. Dr. Miller's medical records of February 15, 2002, indicate claimant complained of left arm pain with no specific injury at work. Claimant was provided pain medication and continued working.

As claimant continued working the pain in his left shoulder gradually worsened. On August 8, 2002, claimant saw Dr. Miller with complaints that his left shoulder pain had worsened. Dr. Miller scheduled claimant for an MRI of his left shoulder. On August 15, 2002, the MRI revealed a partial tear of the rotator cuff of the left shoulder.

On September 9, 2002, claimant saw Dr. George Robinson, II. The doctor's history indicates an onset of shoulder pain in February. It is further noted that claimant one day felt a sharp pain in his arm and got some pain medication and over the next several months continued to have more pain.

Brenda Morris, respondent's manufacturing manager, testified that she had no recollection of the February 5, 2002, meeting with claimant and Mr. Larkins. However, Ms. Morris agreed it was a possibility that such a meeting occurred.

The burden of proof is upon the claimant to establish his right to an award of compensation by proving all of the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.¹

Respondent argues that there are a number of inconsistencies in claimant's testimony that warrant rejection of his testimony and denial of the claim. Initially, respondent notes that during his deposition claimant testified that he had no prior complaints of shoulder pain. However, Dr. Miller's medical record dated January 1, 2002, indicated claimant had left shoulder discomfort for four or five months.

It should be noted that at the January 1, 2002, appointment, claimant was seeking treatment from Dr. Miller for a urinary problem. In the review of systems it was simply noted, "Left shoulder discomfort x 4-5 months." At his deposition claimant was asked if he had ever sought medical treatment for his left shoulder and he responded no. Claimant

¹ *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

was then asked if he had ever complained about his left shoulder to any doctor and the following colloquy occurred:

Q. [Mr. Finkelstein] Okay. So, again, I want to -- I want to make sure. Before this incident in February 2002, you had never seen a doctor, never complained about your left shoulder to any doctor?

A. None.

Q. How long have you been seeing Dr. Miller?

A. Maybe when I -- when I first had this injury. I have a question.

Q. Yes.

A. You're talking about something else, like, another illness I might have had?

Q. Well, you know, I'm asking you --

A. Or --

Q. -- when you first started seeing Dr. Miller for anything, not just for this.

A. Oh. Well --

Q. When -- when --

A. I've seen him for other things, but not my shoulder."²

From the foregoing it appears claimant was uncertain what he was being asked and understood the question was whether he had ever received treatment for his left shoulder and was responding that he had not received any such treatment.

Respondent further points to the fact that claimant advised the doctors that he did not have a specific injury at work even though he testified regarding a specific onset of pain on February 5, 2002. The MRI report dated August 15, 2002, further reflects claimant had shoulder pain for a year.

Although there may be inconsistent comments, nonetheless, claimant has alleged injury through a repetitive series of injuries at work. Even assuming that claimant might have had preexisting pain in his left shoulder that would not preclude a finding of a compensable injury if his work activities aggravated his preexisting condition. It is well established under the Workers Compensation Act in Kansas that, when a worker's job

² Watts Depo. at 32.

duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.³

Although the claimant alleged a specific injury date, he further alleged a series of repetitive mini-traumas each and every day worked thereafter. The claimant's uncontradicted testimony was that as he continued working during the intervening months he began to experience a gradual worsening of left shoulder pain. Uncontradicted evidence which is not improbable or unreasonable will not be disregarded unless it is shown to be untrustworthy.⁴ The Board concludes the claimant has met his burden of proof that he sustained a work-related series of repetitive traumas to his left shoulder and accordingly affirms the ALJ's finding.

As provided by the Act, preliminary hearing findings are not binding but are subject to modification upon a full hearing on the claim.⁵

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Julie A.N. Sample dated November 7, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2003.

BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
Daniel N. Allmayer, Attorney for Respondent
Julie A.N. Sample, Administrative Law Judge
Director, Division of Workers Compensation

³ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

⁴ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

⁵ See K.S.A. 44-534a(a)(2).